

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption)
of Rules I through IV)
pertaining to the Montana)
Clean Indoor Air Act)

NOTICE OF ADOPTION

TO: All Interested Persons

1. On September 8, 2005, the Department of Public Health and Human Services published MAR Notice No. 37-357 pertaining to the public hearing on the proposed adoption of the above-stated rules relating to the Montana Clean Indoor Air Act, at page 1665 of the 2005 Montana Administrative Register, issue number 17.

2. The Department has adopted new rule III (37.113.108) as proposed.

3. The Department has adopted the following rules as proposed but with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

RULE I [37.113.101] DEFINITIONS In addition to those terms defined in 50-40-103, MCA, the following terms, as used in Title 50, chapter 40, part 1, MCA, have the meaning set forth below:

(1) "Designee" means, for purposes of determining who is designated by the department to act on its behalf in enforcement of the Montana Clean Indoor Air Act of 1979, any entity with which the department has entered into an agreement outlining mutual responsibilities.

~~(1)~~(2) "Enclosed room", for purposes of the definition of "place of work" in 50-40-103, MCA, means an area with a wall on all sides reaching from floor to ceiling, exclusive of windows and doors, and does not include an area completely or partially open to the outside air such as a roofed shelter.

~~(2)~~(3) "Private residence" means the personal living quarters of an individual, regardless of the legal status of the property, such as incorporation of a ranch, unless the residence is part of a structure, such as a health care facility, where smoking is specifically prohibited by Title 50, chapter 40, part 1, MCA.

AUTH: Sec. 50-40-110, MCA

IMP: Sec. 50-40-103 and 50-40-104, MCA

RULE II [37.113.104] BARS, CERTIFICATION OF QUALIFICATION FOR EXCEPTION (1) An establishment, as defined in 50-40-103, MCA, may apply to the department for a certificate indicating that the department has determined that it is a bar qualifying for the exception from the provisions of Title 50, chapter 40,

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part 1, MCA, as provided in 50-40-104(5), MCA.

(2) An application for certification may be obtained from the Department of Public Health and Human Services, Montana Tobacco Use Prevention Section, P.O. Box 202951, Helena, MT 59620-2951.

(3) A completed application must be submitted to the department at the address cited in (2). The signature and documentation required by the application will be verified by the department or its designee.

(4) If the department or its designee determines, at the time of application or after a certificate has been granted, that the establishment does not qualify for the exception allowed by 50-40-104(5), MCA, written notice of that decision and the factual basis for the decision will be sent to the individual who submitted the application.

(5) ~~A copy of each certificate that is granted, and of each decision to deny a certificate, will be filed by the department with~~ By November 30 and May 31 of each year, the department will mail to the local board of health of the each county in which the establishment is located a list of the bars in that county that have a current certificate of exception.

(6) Each bar that qualifies for an exception from the provisions of Title 50, chapter 40, part 1, MCA, must post, at the entrance to the bar, an easily readable sign that minors are not allowed in the areas where smoking is allowed.

AUTH: Sec. 50-40-110, MCA

IMP: Sec. 50-40-104 and 50-40-108, MCA

RULE IV [37.113.112] COMPLAINT PROCEDURE REGARDING SMOKING VIOLATIONS (1) An individual who believes that a violation of the Montana Clean Indoor Air Act or of 20-1-220, MCA has occurred may file a written complaint with the department or the local health board or its designee that describes the violation, provides the date of the violation and is signed by the complaining party.

(2) If a complaint is filed with the local health board, a copy of the complaint must be forwarded within five working days ~~of its receipt~~ after the end of the month in which it was received to the Department of Public Health and Human Services, Montana Tobacco Use Prevention Section, P.O. Box 202951, Helena, MT 59620-2951.

(3) If a complaint is filed initially with the department or a designee of the department, a copy will be forwarded within five working days to the local health board of the county in which the violation allegedly occurred.

(4) Once a complaint is filed, the department or a designee of the department, which may include the local health department, will conduct an investigation to determine if a violation occurred.

(5) If the department or its designee, after an investigation, determines that a violation did occur, it will document the violation and file the documentation and the determination of the department or its designee with the office

of the county attorney in the county where the violation occurred.

AUTH: Sec. 50-40-110, MCA

IMP: Sec. 20-1-220, 50-40-104 and 50-40-108, MCA

4. The Department has thoroughly considered all commentary received. The comments received and the Department's response to each follow:

COMMENT #1: The department should include language in the rules that indicates that when the department approves a bar as qualifying for a temporary exception from the Clean Indoor Air Act's smoking ban, the local county attorney would be prohibited from prosecuting a smoking complaint against that bar.

RESPONSE: While smoking is allowed in a bar that meets the statutory requirements for an exception from the Clean Indoor Air Act's smoking ban, it will still need to comply with other provisions in the law, including not allowing youth less than 18 years of age into areas where smoking is allowed and preventing infiltration of smoke into non-smoking areas. Prosecution of such violations by a bar that has received a certificate indicating that it has qualified for a temporary exception is still legally possible, and a rule stating the contrary would be invalid. Therefore, the requested rule change was not made.

COMMENT #2: The department should indicate in the rules who will act as its designees to assist in enforcement of the law.

RESPONSE: Currently, the Montana Departments of Revenue and Justice are acting as the department's designees through the mechanism of memoranda of agreement. Those two state agencies will check for Clean Indoor Air Act violations while conducting routine inspections of bars and casinos under their own statutory authority. The department chose to utilize such agreements, rather than naming the departments in the rules as our agents because it is a more appropriate and legally sound mechanism between co-equal agencies of state government. However, a definition of "designee" has been added to Rule I to indicate that any entity, to be considered a designee of the department, would have to have a memorandum of agreement outlining mutual responsibilities.

COMMENT #3: There is no mandate for public schools to enforce the law, but there should be. Section 20-1-220(3), MCA, which bans tobacco use on school property, states "the principal of an elementary or secondary school, or the principal's designee, may enforce this section." The word "may" should be changed to "shall", thereby making the duty mandatory.

RESPONSE: The department has no authority to change, by rule, statutory language. Therefore, the requested change was not made.

COMMENT #4: Although the law defines what warnings, reprimands and punishments will be instituted for violations in public places, it is still unclear if the establishment, the patron, or both will be fined as well as what constitutes multiple violations.

RESPONSE: The department disagrees. The penalties provision in the law clearly prescribes separate penalties for those who smoke where it is not allowed and those who are responsible for a work or public place but who allow a violation of the law. As for multiple violations by one responsible for a public or work place, local law enforcement is responsible for keeping track of the three-year period within which a third violation becomes a misdemeanor. Therefore, the department disagrees that the law is unclear and, in addition, does not believe it has the authority to, by rule, interpret criminal penalty provisions set by statute.

COMMENT #5: The rationale in the notice of proposed rulemaking for these Clean Indoor Air Act rules stated that Rule II establishes a non-mandatory procedure for a bar to apply for a certificate indicating it qualifies for an exception. Receiving a certificate should be mandatory before a bar is excepted from the smoking ban, and a bar should have to remain smoke-free until it receives a certificate from the department.

RESPONSE: The law by its own terms establishes the criteria for a "bar" that is exempt from the smoking ban--i.e., having a liquor license, earning at least 60% of its gross income from gambling and/or liquor sales, and preventing any infiltration of smoke to an area where smoke is not allowed. There is no mention of a requirement to get a certificate from the department before a business meeting those standards is excepted from the smoking ban. For the department to, by rule, require a certificate to be received before smoking is allowed in a bar that meets the statutory standards would unlawfully go beyond what the law requires, by imposing an additional condition a bar would have to meet. The Montana Administrative Procedure Act, in Section 2-4-305, MCA, requires agency rules to be consistent and not in conflict with the statutes they implement. The department is establishing the certificate of exception process as a mechanism to assist bar proprietors and those involved in enforcing the Clean Indoor Air Act in establishing who qualifies for the exception and who does not.

COMMENT #6: There is no mention of how the law affects private schools and public and private colleges. The status of these institutions needs to be addressed in the rules even if they are exempt.

RESPONSE: Section 50-40-104, MCA, of the revised Clean Indoor Air Act prohibits smoking in any enclosed public place, unless that section allows for an exception-which it does not in the

case of private schools and private and public colleges. Since the law is clear, there is no need for a rule on the subject.

COMMENT #7: Rule II does not describe all of the criteria that a bar must meet to qualify for a temporary exception.

RESPONSE: The law itself states the criteria, as mentioned in the response to comment #5 above. The Montana Administrative Procedure Act, in Section 2-4-305(2), MCA, states that rules "may not unnecessarily repeat statutory language."

COMMENT #8: Rule III should include more detail regarding compliance paperwork for inspections and the role of sanitarians and law enforcement in enforcement activities.

RESPONSE: The law is clear that the department, a local health board and their respective designees have the responsibility to conduct inspections of enclosed public places, work places, and public school property. Rule III states that for every inspection conducted, a written inspection report must be completed and retained by the agency conducting the inspection. Local health authorities already have experience in documenting other kinds of violations, such as those committed by food services, motels, etc., and the department felt that they are competent to develop their own forms for the purpose of enforcing Clean Indoor Air Act violations. However, the department will be developing model forms that local authorities can use if they so desire. The department wanted to prescribe the minimum standards necessary to ensure proper record keeping and communication between the state and local health agencies responsible for enforcing the law. Any additional helpful recommended, but not mandatory, procedures will be outlined in policy documents.

COMMENT #9: The rules need to clearly indicate that law enforcement will be responsible for issuing citations and designate the agencies that will be receiving the fine revenues.

RESPONSE: Violations of the Clean Indoor Air Act are misdemeanors, as stated in Section 50-40-115, MCA. The suggested additions are inappropriate for these rules, since law enforcement authority for citation and prosecution of misdemeanors are fully covered in other Montana statutes. As for who should receive the revenue from fines, the department has no authority to designate the recipients of fines levied for any criminal act, including the misdemeanor fines levied for violations of the Clean Indoor Air Act. Disposition of such fines is set by other statutes.

COMMENT #10: The rules should outline a grace period during which there is no enforcement of the law.

RESPONSE: The effective date for the law is October 1, 2005. No state agency has the authority to amend a law through a rule,

which the department effectively would be attempting by writing a rule suspending, for a grace period, the responsibility of both it and local health boards to enforce the law. Therefore, no grace period can be specified.

COMMENT #11: The rules should state who is responsible for reviewing plans for renovations to comply with the law.

RESPONSE: The department did not do so because rules are meant to set necessary standards to implement a law, rather to simply provide information. That said, for liquor and gaming licensed establishments there is a requirement for building plans to be reviewed by the Departments of Justice and Labor. In addition, any renovations would have to comply with local building codes and use existing construction review processes.

COMMENT #12: There were a number of comments that requested the department promulgate a rule defining "infiltrate", as used in Section 50-40-104(5)(a), MCA, some of which requested allowing various levels of infiltration of smoke from a smoking to a non-smoking area.

RESPONSE: The statute is clear and has granted the department no rulemaking discretion in this area. The meaning of the word "infiltrate" has a universally understood meaning, with no clarification necessary. Therefore, the requested change was not made.

COMMENT #13: A penalty should be added to the rules that revokes the exception allowed in 50-40-104(5)(a), MCA, for failure to prevent infiltration.

RESPONSE: The penalties are set in law and the department does not have authority to amend the statute. However, the department has added language to Rule II allowing it to revoke a certificate of exception, if it determines the criteria for exception outlined in the statute are not met.

COMMENT #14: The proposed rules should offer suggestions as to how business owners might take measures to reduce infiltration.

RESPONSE: Rules are regulatory provisions and are not meant to provide recommendations and suggestions to businesses. Therefore, the requested addition was not made.

COMMENT #15: Rule II should be amended to identify the criteria that must be met to qualify for an exception.

RESPONSE: The criteria are clear in the statute and should not be unnecessarily repeated in the rules. The criteria are also included on the form for requesting a certificate of exception.

COMMENT #16: There should be a signage requirement for bars with an exception that states that youth are not permitted in an

area where smoking is permitted.

RESPONSE: We agree and are adding language to Rule II requiring signs be posted to identify smoking areas and state that minors are not permitted.

COMMENT #17: Comments were received regarding how the law affects personal living quarters within health care facilities such as nursing homes and assisted living facilities. Recommendations were provided to change the definition of private residence so that living quarters in these facilities will be considered private residences.

RESPONSE: The Clean Indoor Air Act specifically requires any health care facility to be smoke-free, including nursing homes and assisted living facilities. Section 50-5-101(23)(a), MCA, defines "health care facility" as meaning "all or a portion of an institution, building, or agency, private or public, excluding federal facilities, whether organized for profit or not, that is used, operated, or designed to provide health services, medical treatment, or nursing, rehabilitative, or preventive care to any individual." Therefore, the department does not have the authority to, by rule, define a personal living area in any health care facility as a "private residence" where smoking is allowed. To clarify that point, the definition in Rule I of "private residence" now includes language indicating that living areas in health care facilities cannot be "private residences" in which the law allows smoking.

COMMENT #18: Because of the special provision in Section 50-40-201, MCA, allowing county-occupied buildings to delay becoming smoke-free, the rules need to clarify the date that county operated nursing homes, assisted living facilities, and other county health care facilities have to comply with the Clean Indoor Air Act.

RESPONSE: The issue above is a result of the apparent conflict between two provisions of the Clean Indoor Air Act, as amended by the 2005 Legislature. Section 50-40-201, MCA, insofar as it applies to county-owned or operated health care facilities, appears to conflict with the provision in Section 50-40-103(3), MCA, prohibiting smoking in any health care facility. Any conflict in statutes is to be settled by the provisions of Section 1-2-102, MCA, which states that "[w]hen a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it." The department is of the opinion that the more particular provision in this case is the one banning smoking in all health care facilities, with the result that even county-owned or operated health care facilities have to be smoke-free as of October 1, 2005.

COMMENT #19: Several commenters asked if minors could be employed in businesses in which smoking is allowed.

RESPONSE: The law is clear that minors are not allowed in any area in a public place in which smoking is allowed.

COMMENT #20: The department should notify bars that received an exception certificate, that the exception expires on September 30, 2009.

RESPONSE: The department will include language on the application for and the actual certificate of exception stating this fact. This is clear in the statute and should not be repeated in the rules.

COMMENT #21: Excepted establishments should be allowed by rule to have smoking and non-smoking hours that allow youth in smoking areas when there is no smoking.

RESPONSE: The statute is clear that youth under 18 are not allowed in areas in which smoking is permitted, regardless of whether smoking is occurring there at the time the minor would be present. The department does not have the authority to amend the statute by rule.

COMMENT #22: A comment was received that when the department grants the exceptions allowed under Rule II, the department should explain certain issues to the bar. A list of suggestions was also provided for inclusion in such explanations (e.g., expiration of exception, annual renewal of exception, revocation for non-compliance, submission of records to assure compliance, information that the exemption will not protect patrons and workers, and signage that restates exception criteria be posted at entrances.)

RESPONSE: The department grants non-mandatory certificates of exception to the statute. The statute itself defines the criteria for exception. Therefore, while the department may provide the suggested information to certificate applicants, no rulemaking is necessary on the subject.

COMMENT #23: The department should require an annual renewal of the exception for each bar to ensure compliance.

RESPONSE: See the response to Comment #5. The exceptions portion of the statute is self-executing. The department will grant, as appropriate, non-mandatory exception certificates to currently licensed bars in 2005. For newly licensed establishments, the process will become part of the application for a liquor/gaming license. In addition, any establishment that believes they qualify can seek an exception certificate at any time until October 1, 2009, the date that the authority for an exception expires.

COMMENT #24: Bars qualifying for an exception certificate must be willing to submit their books for inspection by the

Department of Revenue to determine if they meet the criteria for an exception.

RESPONSE: Under Rule III(3), the department, a local health board, and the designee of either have the authority to request documentation from an establishment to prove that they meet the annual gross income requirements specified in the law. Since the Department of Revenue is a current designee of the Department of Public Health and Human Services, it would have the authority to inspect a bar's books.

COMMENT #25: Under Rule II, the department should include the following statement: "In the judgement of the department, exceptions (to the law) will not protect the health of patrons and employees working in areas where smoking is allowed and that the decision to allow smoking is solely that of the bar and is not endorsed or condoned by the State of Montana."

RESPONSE: This suggestion is not regulatory and does not belong in the rules. The department strongly recommends that all enclosed public places and work places become smoke-free now to protect the health of the public and workers.

COMMENT #26: Signs at the entrances of bars should state the three criteria for an exception from the smoking ban (gross annual income, no youth in smoking areas, no infiltration of smoke).

RESPONSE: There are only two criteria for an exception, which are the annual gross income requirement and the prohibition against infiltration of smoke into any area where smoking is prohibited. The department believes that signage should be kept as clear and understandable as possible. In addition, this particular request is by nature serving more of an educational than regulatory purpose. Since the rules are for regulatory purposes only, the suggestion was not included in them.

COMMENT #27: Rule III or IV should include a requirement that a bar that qualifies for an exception post a sign that provides members of the public with the name and address of the person with whom complaints can be filed.

RESPONSE: The department declined adding such a requirement to the rules. The contact information for the local health board should be readily available through the phone book, and the name and address of the particular local contact may change, making that requirement an unduly onerous and ineffectual burden.

COMMENT #28: There were several comments that complaint and enforcement procedures are not clearly outlined in the rules. Some suggested extensive detail for these procedures.

RESPONSE: The enforcement authorities are clearly designated in the statute as the department, local boards of health or their

respective designees. The proposed rules currently state that complaints must be received in writing by these enforcement authorities. The penalties are clearly delineated in the statute and since the third or subsequent violations within a three-year period are misdemeanors, these would clearly need to be referred to local government. See the response to Comment #8.

COMMENT #29: Some employers are considering making a smoking area by utilizing an enclosed area they may have with air circulating units and exhaust fans. Do the rules permit such a configuration as meeting the requirements of the law?

RESPONSE: For businesses that do not meet the exception outlined in the law this would not be permitted. Because the law is clear, no rule on the subject is required.

COMMENT #30: Is there any required form or content for signage that must be placed at the entrances of enclosed public places?

RESPONSE: The law provides no specific requirements other than the sign should be posted at an entrance, in a conspicuous place, and should include the information that smoking is prohibited in the enclosed public place. The international no smoking sign would meet these requirements, as would any other version of the sign that imparts the same information. Both because the law is clear on its face and because allowing various versions of the sign is burdensome for those responsible for enclosed public places, no rule imposing uniform signage is contemplated.

COMMENT #31: The rules should allow the department and local boards of health to accept anonymous complaints.

RESPONSE: The rules state that complaints must be filed in writing with the department, a local health board or their respective designees in order to begin to provide a legal foundation for prosecution of a violation. The department, local health boards, and their designees can always receive anonymous complaints. However, such complaints cannot be prosecuted on their information.

COMMENT #32: If a complaint to a local health board is not submitted to the department as described in the rules, will the complaint be voided?

RESPONSE: No, there is nothing in the rules that states the complaint would be voided.

COMMENT #33: The rules should include time frames within which the investigation of a potential violation, notification of the potential violator, and any action from the city or county attorney should occur.

RESPONSE: The department cannot set by rule time frames for
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local government investigations and actions.

COMMENT #34: Can the law or the rules be changed to increase the percentage of hotel rooms that are allowed to be smoking from 35% to 50%. How does the law pertain to internal apartments within a hotel?

RESPONSE: The Montana Legislature approved the law and the percentages it established cannot be changed by rule. Internal apartments are considered private residences and are excepted from the statute.

COMMENT #35: The department should revise the definition of "enclosed room" to read as follows (the suggested added language is underlined): "'Enclosed room', for the purpose of definition of place of work in 50-40-103, MCA, means an area with a solid wall or windows (exclusive of doorways), which extend from the floor to the ceiling. This does not include an area completely or partially open to the outside air such as a roofed shelter."

RESPONSE: We agree and have made this change.

COMMENT #36: The department should add the following to Rule II: "The applicant shall sign and submit to the Montana Department of Public Health and Human Services a written statement that reads as follows: I understand that smoking will be completely prohibited in bars and casinos in the State of Montana as of September 30, 2009. When that occurs, any exceptions will no longer apply."

RESPONSE: This is not necessary as the law is clear that this exception is in effect only through September 30, 2009. Further, similar language is included on both the request for an exception certificate and the exception certificate itself.

COMMENT #37: The department should add the following to Rule II: "The applicant shall state and prove that the establishment, as defined in 50-40-103(4), MCA, in which the applicant's enterprise operates, is a legal entity which is legally and physically separated from (enclosed and free-standing) or not part of any establishment exempt from this law."

RESPONSE: While the meaning of the comment is somewhat unclear, the department understands it to mean that the department should amend the rules to require each establishment where smoking is allowed to be the sole occupant of its own free-standing building. The department does not agree that the law requires such a limitation. Therefore, the department does not have the authority to specify the limitation by rule.

COMMENT #38: Bars that qualify for an exception from the smoking ban and that continue to allow smoking should be required to post signs indicating that smoking is permitted in the establishment and that tobacco smoke is known to cause heart

disease, cancer, and lung disease in smokers and non-smokers.

RESPONSE: While the department has the authority to promulgate rules implementing the Clean Indoor Air Act, it is not clear that it has the authority to require a sign that is primarily for educational purposes, rather than regulatory. As for a sign noting that smoking is allowed, the department is adding a requirement for a sign noting that minors are not allowed in that area. See the response to comment #16.

COMMENT #39: In Rule III(3), the department should be allowed to request and review documentation beyond that which is necessary (the word desirable is suggested) in order to prove gross annual income meets the requirements for an exception as outlined in the law. In addition, there was a suggestion to impose a fee to pay for reviews by certified public accountants.

RESPONSE: The request goes beyond what is necessary to implement the law. The Montana Administrative Procedure Act requires rules to be necessary for such implementation. The Clean Indoor Air Act does not grant discretion to the department to require any fees.

COMMENT #40: The department should include creation of a complaint telephone line in the rules.

RESPONSE: Complaints must be provided in writing, as outlined in the rules, in order to ensure proper documentation of a violation. The department has created a toll-free information line, but will not operate the line for purposes beyond that. The information line can direct persons with complaints concerning how and to whom a written complaint can be submitted.

COMMENT #41: Language should be added to protect employees or others who bring complaints related to the Clean Indoor Air Act.

RESPONSE: State and federal "whistle-blower" protections are currently in place to protect employees and consumers in these situations. The department does not have the authority to address that issue by rule.

COMMENT #42: Language should be included to allow family farms and ranches that are part of a family corporation to be included in the definition of a private residence.

RESPONSE: The department agrees, had intended to provide that clarification with the definition of "private residence" included in the original notice of proposed rulemaking, and has revised the definition of private residence to more clearly include family farms and ranches that are part of a family corporation.

COMMENT #43: Proposed Rule II(4) should require a response from the department as to why a request for certificate of an

exception to the law was denied. Also, can a bar owner make a change to their business and reapply for a certificate?

RESPONSE: The rule already requires the department to state the reasons for a denial of a certificate. As for the question posed, there are two criteria for an exception clearly outlined in the law. These criteria will be the basis for acceptance or denial in granting a certificate of exception. A business owner could make changes to their business and reapply for a certificate.

COMMENT #44: The department should promulgate rules allowing a grievance process for denial of an exception.

RESPONSE: See the response to Comment #5. Since the certificate of exception process is non-mandatory, denial or revocation of a certificate should not trigger a grievance process. If a certificate is denied or revoked, the reasons for that action would be the basis for a local investigation to determine if a violation of the Clean Indoor Air Act was occurring.

COMMENT #45: Rule IV should not allow citizen complaints regarding violations.

RESPONSE: The law does not prohibit citizen complaints, and the department does not have the authority to do that by rule.

COMMENT #46: The complaint and enforcement procedures for counties that do not have a designated health board should be clarified.

RESPONSE: The problem should not exist because Montana law requires each county to have a board of health (50-2-104, MCA).

COMMENT #47: The rules should include an exception for work places that are private clubs, where the public may enter as guests.

RESPONSE: Private clubs that serve as places of work are not excepted and are subject to the smoking ban by the law. The department cannot do by rule what the law does not allow.

COMMENT #48: In Rule III(4), a reference should be included that if the alleged conduct occurred within city limits, the complaint is forwarded to the city attorney for prosecution, and, if it occurs outside the city limits, the complaint is forwarded to the county attorney for prosecution.

RESPONSE: The local authority with the responsibility to enforce the Clean Indoor Air Act is the local board of health, which is a county entity. The county attorney is, in turn, the enforcement officer for the county board of health. The department cannot, by rule, change that statutory pattern.

COMMENT #49: The school violations and penalties are not clearly outlined in the law. What will the penalty be for someone who is using tobacco products on school grounds? Who will enforce this law on public school campuses?

RESPONSE: The department disagrees that the penalties for school infractions are not clearly outlined. Section 20-1-220(4), MCA, of the laws pertaining to public schools, states that "[a] violation of this section is subject to the penalties provided in 50-40-115." Section 20-1-220(3), MCA, also states that the principal of an elementary or secondary school, or the principal's designee may enforce this section. The law being clear, no rulemaking on the subject is needed.

COMMENT #50: The rules should clarify whether or not smoking is allowed in private motor vehicles used for work purposes.

RESPONSE: The issue involves statutory interpretation. The department will be carefully analyzing the law to determine what the Clean Indoor Air Act requires in this case and may consider adding an interpretive rule on the subject in the future.

COMMENT #51: The rules should clarify whether or not smoking is allowed in private residences if any person works there.

RESPONSE: The issue involves statutory interpretation. The department will be carefully analyzing the law to determine what the Clean Indoor Air Act requires in this case and may consider adding an interpretive rule on the subject in the future.

COMMENT #52: A new rule should clarify whether or not smoking outdoors near a workplace is prohibited.

RESPONSE: The statute prohibits indoor smoking and does not address outdoor smoking. Therefore, the department has no authority to prescribe by rule anything about outdoor smoking.

COMMENT #53: Rule I should allow businesses to choose whether or not to become smoke-free.

RESPONSE: This would amend the statute. The department does not have the authority to do so.

COMMENT #54: Rule II should allow all casinos, taverns, and bars to be exempt until 2009.

RESPONSE: This would amend the statute and the department does not have the authority to do so.

COMMENT #55: Rule II should require that minors not be allowed in smoke-free areas of establishments that meet the exception criteria and can have both smoking and non-smoking areas.

RESPONSE: The law prohibits minors from being in areas where smoking is allowed and requires bars that qualify for an exception to the smoking ban to prevent infiltration into a non-smoking area. So long as no infiltration occurs into the no-smoking area, nothing in the law precludes a minor from being in that area, and the department has no authority to do so by rule.

COMMENT #56: Concerning Rule III, it is unnecessary for a copy of each certificate of exception the department issues to be sent to the local board of health having jurisdiction. A periodic list of those with certificates would be sufficient and handy.

RESPONSE: The department agreed and amended Rule III(5) accordingly.

COMMENT #57: A local complaint will customarily be acted upon locally. Therefore, it is an unnecessary burden for local authorities to have to submit a copy of every complaint to the department within five working days after its receipt. Submission of the copies after the end of each month should be sufficient.

RESPONSE: The department agreed and made the change.

GENERAL: Other comments were received that were directed at the Clean Indoor Air Act, rather than the rules, and were not answerable by rulemaking or relevant to the rules. Those comments will be addressed separately through direct response to those making the comments and public education concerning the issues raised. In addition, various entities requested various types of waivers from statutory requirements, and the statute is clear that no waivers are allowed.

Ellie Parker for
Rule Reviewer

John Chappuis for
Director, Public Health and
Human Services

Certified to the Secretary of State October 17, 2005.